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U.S. Family Law Along the Slippery Slope: the limits of a sexual rights strategy for polyamorous parents

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Abstract

Families in the United States are rapidly changing, and the normative familial model of two married, monogamous, heterosexual parents with children no longer reflects the majority of U.S. families. Nonetheless, state incentive-based policies and discriminatory family laws continue to enforce heteronormative monogamy. Recent changes to the U.S. legal landscape have produced limited formal recognition and protections for same-sex couples and LGBTQ parents, and even these narrow rights are withheld from other diverse familial configurations including families with polyamorous parents. This article uses the concept of *sexual citizenship* to frame the analysis of U.S. family courts' normative construction of family, identifying striking parallels between family courts' historical and contemporary prejudicial treatment of LGBTQ parents and the institution's similar delegitimization and denigration of polyamorous parents today. This paper reviews polyamorous parents' efforts towards achieving legal and societal legitimatization, finding significant parallels with legal strategies LGBTQ parents utilized to seek legal recognition and protection prior to federal recognition of same-sex marriage. This paper highlights the inadequacies of such a formal sexual citizenship approach, finding that a limited strategy of accumulating specific sexual rights fails to address non-monogamy's more radical cultural presence as well as the (non-legal) informal aspects of belonging needed to

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improve the livability of polyamorous parents' and their children's lives. This paper concludes with recommendations for improving the treatment of non-traditional families including LGBTQ, polyamorous, and other blended families, both within and outside the legal institution.

Keywords
polyamory, family, LGBTQ, law, sexual citizenship

Introduction

Multi-parent families composed of more than two adults with or without children include blended families, families with polyamorous parents, families with children created through assisted reproductive technologies, and multi-generational households with more than two adults (Abraham, 2017; Quinn, 2018; Siadatifard, 2020). Polyamorous families are a multi-parent family form and are the primary focus of this article. Polyamory is a type of consensual non-monogamy (CNM),—a term covering a diverse array of relationship structures in which all parties consent to some form of non-monogamous romantic, intimate, and/or sexual interactions, often with the expectation of gender egalitarianism (Easton and Hardy, 2009; Sheff, 2013; Taormino, 2008). Distinguishing it from some other forms of CNM, polyamory emphasizes emotional intimacy amongst multiple people of any gender who openly conduct affective, romantic, and/or sexual relationships with multiple partners (Sheff, 2005).

Although polyamorous and other multi-parent families have become increasingly common in the United States, legal institutions lag behind this demographic shift and it remains unclear how courts will respond to these families' efforts to formalize, recognize, and protect themselves (Abraham, 2017; Anderlini-D'Onofrio and Alexander, 2009; Bramlett and Mosher, 2002; Goldfeder and Sheff, 2013; Monte, 2019). This gap between the cultural and demographic realities and the lack of legal formal recognition mirrors U.S. laws' prior and contemporary treatment of same-sex couples and LGBTQ parents. Laws in the United States continue to discriminate against LGBTQ parents, many of whom routinely face judicial sexual prejudice and transphobia in their attempts to retain custody or secure visitation of their children (Huff, 2001; Tenuta, 2011). As the constitutions of family in the United States and around the world continue to diverge from narrow conceptions of two different-sex married parents with children, family law and theory must begin to consider families with more than two adult parents or caregivers (Epstein, 2018; Parkman, 2005).

In this paper, we explore the discriminatory legal treatment of families with polyamorous parents in the United States and identify the limits of available legal avenues for formal recognition and protection (Dryden, 2015; Klesse, 2016). Adopting an expansive frame of sexual citizenship that conceives of citizens as existing beyond formal limits of law as well as sexuality and intimacy beyond sexual practices alone, this paper seeks to

demonstrate the failures of a strictly sexual rights based approach for diverse family forms, including polyamorous parents. First this article reviews literature relevant to parenting in LGBTQ and polyamorous families, highlighting the considerable social, demographic, and legal similarities and differences between polyamorous and LGBTQ people and parents in the United States. That section also contains a review of literature relevant to sexual citizenship. Second, this article reviews the scant but instructive U.S. case law on polyamorous parents and their families and draws comparisons to the analogous court treatment of LGBTQ parents who attempted (or were forced) to utilize family courts to gain formal familial protections (Baumle and Compton, 2017). Third, this paper presents a concise survey of five common legal strategies that LGBTQ parents have employed to secure sexual rights for themselves and their families and examines these strategies' tenability for the recognition and protection of polyamorous-parented families. Finally, this paper identifies the considerable constraints of these legal tools and provides an expansive critique of the overall effort to garner sexual citizenship via the accretion of sexual rights for polyamorous, LGBTQ, and other non-traditional parents in the United States (Bell and Binnie, 2006). This paper concludes with recommendations for improving the treatment of non-traditional families including LGBTQ, polyamorous, and other blended families, both within and outside the legal institution.

Literature review

This section begins with an explanation of the rise in CNM relationships and then identifies similarities and differences between CNM and LGBTQ relationships and families. Next, it reviews literature pertinent to the ways in which legal and social systems treat polyamorous and LGBTQ families. Last, this section summarizes literature on some of the social hierarchies and inequities that shape citizenship recognition.

Rise of CNM

Similar but culturally distinct forms of what today we might call consensual non-monogamy have existed for centuries in different contexts, societies, and countries across the globe (Sheff and Tesene, 2015). Changing sexual mores and internet communications have made contemporary CNM increasingly common and visible in the United States over the last several decades (Conley et al., et al., 2013; Moors, 2017). Multiple factors in the United States have intersected to produce this boom in CNM. Sexual mores have expanded significantly in the last 50 years (Miller, 2021), and the advent of Internet communications has expanded community for sex, gender, and other minorities (Hall, 2018; Vartabedian, 2019). Social media have played an especially important role in facilitating both online relationship formation with long lost loves and new partners from a large virtual pool, as well as relationship maintenance with support for and advice on sustaining a wide range of relationship styles (De Graeve, 2019; Lennes, 2020). Gender neutrality appears to be a prerequisite for polyamory and some other forms of CNM (in contrast to the more commonly known form of polygyny in which one husband has multiple wives) (Sheff and Teseane, 2015). Perhaps most importantly,

monogamy has proven (Klesse, 2016) unworkable for many relationships, and people are coming to consider CNM as an alternative to cheating and/or divorce (Sheff, 2014). Younger people are less likely to marry, and some postpone marriage (Allred, 2019; Hemez, 2020), while others elect to or end up remaining single (Stahnke and Cooley, 2020; Van Tilburg and Suanet, 2019).

Scholars estimate that 4–5% of adults in the United States are currently engaged in CNM relationships (including polyamory), that 20% have done so during the course of their lifetime (Conley et al., 2013; Conley et al., 2013; Rubel and Burleigh, 2020), and a recent survey found that 1 out of 6 interviewees desired to engage in polyamory (Moors et al., 2014). Of those who engage in or identify as polyamorous, some also form long-term bonds in which people live in families composed of multiple adults linked through romantic and platonic relationships who may or may not have children or be legally married to at least one of their partners (Sheff, 2013). This rising visibility of polyamorous relationships and families comes in conjunction with and as a result of larger social changes around sexualities and their socio-legal implications. Polyamorous parents represent a significant challenge for the legal system's traditional construction of family; with more than two potential parents and care givers who may be involved in multiple sexual or romantic relationships at a time, polyamorous families appear largely legally unintelligible to the norms of heteronormative coupledom in family court (Authors, forthcoming). As some scholars had hoped or feared, Federal legal recognition of same-sex marriages in 2015 has indeed expanded familial legal horizons. This has many legal scholars and community members wondering whether such expansion could include CNM and polyamorous relationships and families—a particularly apt question as mounting evidence demonstrates both considerable demographic overlap between LGB and CNM persons, as well as parallel legal and social needs for acceptance and recognition.

LGBTQ & CNM comparison

Research (Haupert et al., et al., 2017; Levin et al., 2018; Pallotta-Chiarolli et al., 2020) indicates that CNM is considerably more common amongst LGB identified people than the general population. In the United States, polyamorous people, parents, and relationships share considerable overlap with LGBTQ populations (Moors et al., 2014; Palotta-Chiarolli et al., 2020; Rossman et al., 2019; Sheff, 2011; Wosick-Correa, 2007), especially among bisexuals and gay men (Adam, 2006; Coelho, 2011; Pallotta-Chiarolli et al., 2020). Both polyamorous and LGBTQ families tend to construct *chosen families* of loved ones connected through intentional, intimate bonds and not necessarily biological or legal ties (Weeks et al., 2001; Weston, 1991). These families may endure beyond the conclusion of romantic or intimate relationships amongst partners, whereby ex-partners still consider each other family after transitioning to platonic roles (Sheff, 2014; Weston, 1991). Prior to state or federal recognition of same-sex marriage, LGB couples often sought social recognition of their relationship through non-legally binding commitment ceremonies (Hull, 2006); polyamorous people conduct similar ceremonies today (Sheff,

2011, 2013), as the United States prohibits plural legal marriages (Edmunds Act, 1882; Smearman, 2009).

Despite the similarities between LGBTQ and polyamorous families, heterosexual cisgender polyamorous people and parents diverge from monogamous LGBTQ people and parents in significant ways. In general, polyamorists are less recognized (Sheff, 2013, 2020; Obadia, 2020), under researched (Sheff, 2011), and until 2020 were uniformly neglected by state or municipal legislation. Although both groups experience stigma and discrimination as a result of their identities and behaviors, the motivations behind the discrimination against LGBTQ and polyamorous people and parents likely draw from distinct social constructs. Namely, those who "fail" to desire or engage in exclusively different-sex sexual interactions (or sexual interactions of any kind) and/or do not identify as heterosexual may experience sexual prejudice and the institutional barriers of heteronormativity. Heteronormativity is the institutionalized privileging of different-sex sexual practices and relationships (Warner, 1993).

In contrast, polyamorous people may experience the consequences of *compulsory monogamy*. Compulsory monogamy (a term derived in part from Adrienne Rich's concept of compulsory heterosexuality; Rich, 1980) refers to the institutional and cultural narratives that construct the monogamous dyadic relationship as the only healthy and fulfilling relationship option (Pieper and Bauer, 2005; Mint, 2004; Schippers, 2016). In part because polyamorous people are far less socially recognizable than are people in same-sex relationships (Sheff, 2013, 2020), heterosexual polyamorous people do not generally experience "queer-bashing" in the ways that LGBTQ identified people and parents might (Rambukkana, 2010). Alternately, dyadic same-sex couples may benefit from some of the institutionalized effects of mononormativity (Schippers, 2016). Regardless of the potential benefits afforded to both groups by their relative assimilation into select social norms, each nevertheless occupies social positions that are far less favored, less valued, and less "charmed" (Rubin, 1980) than other more normative relationship structures, sexualities, or genders (Ho, 2006). This mutual marginalized status in turn hinders polyamorous and LGBTQ families' access to equitable treatment and social benefits.

Both LGBTQ and polyamorous parents experience social stigma and discrimination in the United States. When outed or coming out as one (or both) of these identities, many LGBTQ and polyamorous individuals experience strained relationships with their biolegal families due to such stigma (Sheff, 2011). A recent study (Witherspoon, 2020) found that more than half of CNM people experience some form of discrimination, harassment, or violence related to their CNM relationships. This was particularly true for polyamorous participants (Witherspoon, 2020). Research (Palotta-Chiarolli et al., 2006, 2010) indicates that polyamorous families in the education system experience stigma if out or outed, or if not out, the emotional and social costs associated with attempting to pass as a monogamous family.

LGBTQ people and parents experience high rates of discrimination. On average, one in four LGBTQ people have experienced discrimination as a result of their gender and sexual orientation within the past year (Center for American Progress, 2016) and 27% of transgender people report being terminated, not hired, or not promoted as a result of their

gender identity (National Center for Transgender Equality, 2015). Beyond these shockingly high numbers, statistics on discrimination and stigma represent the lived experiences impacting polyamorous and LGBTQ people, parents, and their children. The multifarious impacts of stigma reverberate throughout the halls of family courthouses across the United States, producing discriminatory judgments that are heavily dependent on judicial private bias, the presence or absence of state protections, and whether a family has the financial and social capital to afford costly litigation to protect themselves (Authors, forthcoming).

(Sexual) citizenship

The literature on sexual citizenship offers varied and at times, conflicting definitions of the term; however, for the purposes of this article, we take sexual citizenship to mean the dynamic process through which cultural (and legal) conceptions of citizenship are impacted by sexual practices and sexuality norms and, vice versa (Richardson, 2017). This includes sexual rights—those legal rights that are specifically recognized, protected, or denied to specific individuals or groups based on sexual practices, identities, and/or relationships (Richardson, 2000). However, sexual citizenship is far more than the combination or accumulation of sexual rights alone (Richardson, 2017). Sexual rights, in and of themselves, tell little about the social constructedness of those rights, leaving out necessary and important political, moral, economic, and cultural stories of how they came to be given or withheld from certain groups (Plummer, 2006). Further, sexual rights do not address the sexual, relational, and intimacy cultural norms that construct, impact, and potentially limit a person's capacity for everyday living and belonging within society.

Sexual citizenship includes the cultural, political, and economic conceptions of belonging that exist outside the legislative halls of formal legal rights and instead exist in the mess of everyday life (Fraser, 2008; Roseneil, 2013). This also includes formulations of citizenship beyond that of the nation-state, including citizenship at the cultural, digital, corporate, or economic levels (Nash, 2009). Sexual citizenship exists in and across jurisdictional Russian nesting dolls to include neighborhood, municipality, nation-state, and global citizenships (Yuval-Davis, 1999). Furthermore, sexual citizenship is inclusive of all interactions between citizenship, intimacy, and affective relationships beyond the purely sexual (Richardson, 2017). In the United States, social and legal understandings of citizenship have been rooted in heteronormative assumptions and expectations of sexuality and sexual practices (Bell and Binnie, 2000). This includes expectations of monogamous couplings, procreative sex, and a nuclear familial model with distinct gendered divisions of labor. Institutionalized heteronormativity, then, reaches beyond strictly legal questions of sexuality and sex to (seemingly) non-sexual aspects of social life including employment, immigration, and housing. The repercussions of heteronormativity is felt not only by LGBTQ persons but heterosexually-identified persons as they are also expected to fulfill certain sexuality, gender, and relationship norms (Seidman, 2002; Skeggs, 1997).

Both LGBTQ and polyamorous families have sought to gain recognition and protections by pursuing sexual citizenship—first by building a community and identity around a sexuality, and then by seeking inclusion within the social definition of legitimate

community members and the rights granted to other citizens (Johnson, 2017). Sexual citizenship offers sexual minorities a possible route towards greater social equality when carving out political, social, and physical space (Hartal and Sasson-Levy, 2017; Mackie, 2017). As citizenship is embedded in a socio-legal matrix of heteronormative expectations, to claim recognition of groups that exist outside such norms is to "argue for the transformation of the concept" (Weeks, 2000:191). These arguments have predominantly taken on an explicitly legal form.

Thus far, such efforts towards sexual citizenship in the United States have largely been focused on securing legal rights like same-sex marriage and non-discrimination employment protections. This approach to sexual citizenship has some significant limitations and tends to overlook the deep-seated (and harmful) neoliberalist values that underly such rights (Cooper, 2004; Richardson, 2000, 2017). Legal and sexual rights are premised on the collective untruth of the freely choosing individual, despite a social structure in which inequity is instituted and perpetuated against certain groups of persons. This myopic focus on individual choice and agency largely ignores the structural factors of systemic oppression at work to prevent collective and individual belonging, including discrimination perpetuated by the state itself. Further, seeking social recognition and protection in the United States via this particularly limiting sexual citizenship strategy risks reaffirming citizenship norms rooted within white supremacy, cis-normativity, and sexism, as well as potentially expanding modern homonormativity and homonationalism as such norms go untested when legal rights merely expand to include another group (Hartal and Sasson-Levy, 2017; Johnson, 2017; Mackie, 2017). Citizenship rights come at the cost of assimilating into the bounds of normalcy and homogeneity, excluding those unable or unwilling to undergo such enfranchisement. Basing citizenship on narrow assimilation requirements risks overlooking or even erasing the complexities of queer peoples' lives and families that exist outside of social conventions (Cooper, 2004; Dreher, 2017; Hartal and Sasson-Levy, 2017).

The already quite limited institutional recognition of LGBTQ persons is nevertheless conditional, requiring such persons and relationships to exist within the boundaries of the "new homonormativity" (Duggan, 2002). Such homonormativity is de-sexualized, depoliticized, and deradicalized—at odds with the originally liberatory, transgressive queer movement (Duggan, 2002). Institutionally, bids for sexual citizenship fail to achieve universal equality and instead leave hegemonic and discriminatory legal and political practices undisturbed (Hartal and Sasson-Levy, 2017). In the United States, such homonormative ideals have even been interwoven into national politics, establishing what Puar (2007) has termed *homonationalism* whereby LGBTQ rights are utilized as the supposed rationale for the engagement in globalization and war. In many ways, the queer movement has merely been re-woven into the tapestry of the already established heteronormative familial and relational paradigms, rather than accepted and celebrated within its own threads of difference.

Citizenship acts as a heavy-handed gate keeper, restricting who is a legitimate, good citizen. This dynamic patrolling occurs across multiple dimensions, including policing not only who is considered a citizen, but also what relative rights they are accorded. Not all citizens are considered equal under the law or social ire. Citizenship as a concept has

been based on whiteness in both the United States (Kaur, 2020; Sweet, 2019) and Europe (Amaturo, 2019; Lundström, 2017). From counting people of African descent as ⅗ of a person in the U.S. Constitution (Art. 1, Sect. 2, 1787) to contemporary notions of global citizenship grounded in white access to all corners of the globe (Heron, 2019), notions of white supremacy have permeated overt and subtle constructions of true citizenship. Citizenship as both a legal and social concept can act to create, perpetuate, and enforce already established social inequalities, including along racial and ethnic dimensions (Lister, 1990; Yuval-Davis, 1997). Monogamy acts as a hallmark of white, western citizenship (Navarro, 2017; Rambukkana, 2010; Witte, 2015). As an organizing principle of Western society, monogamy has acted to exclude all relationships and persons that do not or cannot procreatively produce "good" citizen offspring, whereby good is imbued with race, class, and sexuality normative dimensions (Hubbard, 2001). "[C]itizenship is encoded with normative assumptions about sexuality that encourage and promote particular kinds of sexual and intimate relationships, where importance is placed on mutual commitment, love, responsibility of care, marriage and monogamy as the ideal" (Richardson, 2017:196). Plural partnerships are formally disincentivized within U.S. law; such restrictions include the prohibition on legal recognition of plural romantic partnerships, the limited allotment of shared health care benefits to only a (single) spouse, and the narrow definition of "family" for the purposes of medical leave or bereavement benefits (Stein, 2020). Less explicit barriers to non-monogamous partnerships include prejudicial judgments against openly CNM and polyamorous litigants in courts of law.

Family court treatment of LGBTQ and polyamorous families

Through discursive and hegemonic processes, family law has constructed, controlled, and policed not only the legal definition of family and constituent definitions such as parent or child, but has further erected more systemic barriers and obstacles for non-traditional family formation (Richman, 2002; MacDougall, 2000; Seidman, 1997). Despite its exceptional position of power over vulnerable families, both U.S. family laws and their application in court are infamously ambiguous, inconsistent, and inequitable (Shapiro, 2020; Huff, 2001; Tenuta, 2011). Trial court judicial private biases against non-traditional families go largely unchecked, unless both the family can afford to appeal (which, with lawyer and court fees, can be quite burdensome) and the appellate court finds that the judge abused her discretion. Trial courts are awarded a considerable degree of discretion in their judgments and they are unlikely to be overturned. As such, family trial courts act as insidious sites of discrimination against non-traditional families, whereby prejudicial judgments stand, either due to lack of familial funds to pursue an appeal or because of the difficult standard by which such appeals are judged (Richman, 2002; Charlow, 1994; Guggenheim, 1994; Parker and Schneider, 1991; Polikoff, 2003).

Family courts have routinely issued negative judgments against LGBTQ parents, limiting a LGBTQ's parents right to custody or visitation on the basis of their real or perceived gender or sexual orientation(s). These judgments have included denying a child's non-biological lesbian mother the right to parent (*Hall v.* Hall, 1980; *Bottoms v.* Bottoms, 1996), awarding full custody to a transgender parent only if the parent conceals

their transgender identity from their child (P.L.W. v. T.R.W., 1994; In re Marriage of D.F.D., 1993; In re Custody of T.J., 1988), and ruling that a gay parent's decision to be out about their orientation and same-sex relationship was equivalent to choosing their sexual gratification over the well-being of their own children (*Roe v.* Roe, 1985:728). LGBTQ parents have faced considerable uncertainty in family court regarding recognition of their legal parental status (Gash and Raskin, 2016). For example, in the case of *Alison D. v. Virginia M.* (1990), a lesbian non-biological parent ("Alison") was denied all custodial and visitation rights over her own child (*Alison D. v Virginia M.*, 1990). Despite Alison's long history of caring for the child she shared with her same-sex partner for years, and despite evidence that both partners had agreed to raise the child together, the court found that Alison was - by all legal metrics of being related by blood, marriage, or formal adoption—a stranger to her child (*Alison D. v. Virginia M.*, 1990: 655). This court precedent was not truly overturned for more than 20 years (Matter of Brooke S.B. v. Elizabeth A.C.C., 2016:28).

Legal scholarship (Shapiro, 2020; Huff, 2001; Tenuta, 2011) examining custody disputes over the last several decades indicates that family courts across the U.S. have routinely held that a LGBTQ parent's identity was irrebuttable, or at least presumptive, evidence that the parent was not fit to parent as their non-conforming gender or sexual orientation somehow harmed their children. Although some states and courts have recently changed this standard by legislative decree, court precedent, or informal value shifts within the judiciary, discrimination against gender and sexual minority parents nevertheless continues through more discreet mechanisms like undisclosed judicial bias (Cohen, 2017; Shapiro, 2020). Even after the Supreme Court's recognition of same-sex marriage in Obergefell (2015) and the rise in public support of same-sex marriage (Obergefell v. Hodges, 2015; Pew Research Center, 2015), LGBTQ parenting remains socially and legally contested (Gash and Raskin, 2016).

Today, polyamorous parents face similarly hostile and discriminatory treatment in family courts. Though there is a relative dearth of judicial decisions directly addressing polyamorous people and their families, this article finds that the limited available case law belies a trial court tendency to presume that a parent's polyamory indisputably harms their children—akin to judgments issued against LGBTQ parents (Authors, forthcoming). A review (Authors, forthcoming) of the available cases indicates that family court judges routinely make such determinations without supporting evidence of harm caused by polyamory, and their decisions are often riddled with judicial statements evidencing private bias against polyamorous people. For example, in the case of V.B. v. J.E.B. (2012), a Pennsylvania trial court denied a father's right to custody to both his two children after finding that the father's engagement in polyamory—what the court referred to as an "unorthodox lifestyle"—"was detrimental to his children" (V.B. v. J.E.B., 2012:1201). In V.B. versus J.E.B. (2012), a woman lived in a triad (three-person polyamorous relationship) for many years with her husband and another man, and birthed two children she conceived with the other man. The children were placed with their maternal grandparents during a child welfare investigation, but were returned to the parents once the investigation was completed (V.B. v. J.E.B., 2012). The relationships among the woman, her husband, and the father dissolved, and the parents shared custody while

giving the grandparents every other weekend (V.B. v. J.E.B., 2012). The grandparents filed suit to modify custody asking that either they or the mother receive primary custody (V.B. v. J.E.B., 2012). The trial court granted the grandparents primary custody, with the parents each getting 2 days a month with the children (V.B. v. J.E.B., 2012: 1195). The Court's reasoning included five factors that it said overcame the presumption of parental custody, but put particular emphasis on the detriments of the parents' history of polyamory (V.B. v. J.E.B., 2012: 1198). The trial court claimed to "not judge 'polyamory' itself as immoral or unethical" but found it to be contrary to the children's best interests (V.B. v. J.E.B., 2012: 1200). On review, the Superior Court, found that there was no evidence that polyamory harmed the children, and it was an abuse of discretion for the court to conclude that the parents should be denied custody to their children on this basis (V.B. v. J.E.B., 2012: 1201). Accordingly, the Court granted the father primary physical custody and remanded for the development of a custody schedule.

The case of In the Interest of R. E. (2015), closely parallels *V.B. v. J.E.B.* in its findings against the "polyamorous lifestyle" (In the Interest of R.E., 2015:55). A mother appealed the termination of her parental rights, which had required findings by a standard of clear and convincing evidence that if the children were to remain with her they would be "deprived," meaning "without proper parental care or control, subsistence, education as required by law, or other care or control necessary for the child's physical, mental, or emotional health or morals" (In the Interest of R.E., 2015: 57). The trial court concluded that the children would be deprived because of the parents' "polyamorous lifestyle" and because the mother had not "complete [d] counseling to address" it, among other reasons (In the Interest of R.E., 2015: 56, 58). The Court of Appeals reversed the termination of parental rights, finding that the lower court did not have sufficient findings to support many of its conclusions (In the Interest of R.E., 2015: 59). Regarding polyamory, "the evidence showed only one unusual incident, and there was no testimony that the children were exposed to it" (In the Interest of R.E., 2015: 58).

Although this discriminatory legal treatment of both LGBTQ and polyamorous parents and their children is demonstrably harmful, it should come at no real surprise. Non-traditional and diverse families such as unmarried parents, interracial couples, unmarried couples, non-citizen parented households, and parents of color have long faced discrimination in U.S. legal institutions, particularly family law courts (Collins, 1998; Gash and Raskin, 2016; Harp and Bunting, 2020; Maldonado, 2017; Polikoff, 2003). Family law's failure to adequately recognize and protect non-traditional families, including but not limited to LGBTQ and polyamorous-parented families, harms both parents and their children. The lack of formal recognition of these parental relationships hampers children's access to a host of legal benefits such as survivor benefits, inheritance, wrongful death compensation, worker's compensation, parental custody and visitation, bystander recovery, life insurance, social security, health insurance, hospital visitation, disability benefits, and more. Children of families that the government fails to recognize and protect are, thus, unequally treated under the law in comparison to those from state-sanctioned and culturally normative families (Smith, 2013). Though untenable, such government-sponsored discrimination continues today against children being raised by parents with non-normative genders, sexual orientations, or romantic relationships.

LGBTQ legal strategies to secure sexual citizenship

LGBTQ parents whose lives and relationships existed outside of legal and social familial norms have nevertheless worked within and with the normative institution of the law for decades, applying institutional tools both to protect their families and influence family law to become more equitable (Gash and Raskin, 2016, Hull, 2003). Historically, the legal and social definitions of family and parent have predominantly relied upon the presence of marriage or blood relations (Brown and Manning, 2009); both of which were difficult to insurmountable obstacles for many same-sex couples, without access to legal marriage and unable reproduce children biologically related to both parents. In consequence, LGBTQ parents and same-sex couples used existing methods to fight for their families, and in the process reformed, expanded, and reimagined additional novel legal tools to protect their partnerships. The following section presents a survey of five of the more common legal tools that LGBTQ families have deployed, reimagined, or repurposed in their bid to gain sexual citizenship through family law. These tools fall into two broad categories of legal recognition: relationships and parentage. This section then addresses whether these tools would be applicable for polyamorous parents and their families today as well as their overall shortcomings for all non-traditional family forms.

Strategy one: Recognition of relationship

The first of the five legal strategies that LGBTQ parents have used in their pursuit of sexual citizenship is to pursue the recognition of their relationships via domestic partnerships, civil unions, and marriage. Marriage has been of key import because it acts as a gateway to a significant bundle of rights that would be near impossible to recreate through other avenues (Dreher, 2017; Sheff, 2011). In the United States, legal marriage is a semi-contractual arrangement that typically ensures the legal status of a romantic relationship (Halley, 2010). Activism from mainstream LGBTQ organizations has long prioritized access to marriage as a proxy for equal citizenship (Babst, 2002; Chauncy, 2004; Hull, 2001; Polikoff, 2003), although some also focused on other marital-like statuses, such as civil unions and domestic partnerships, when marriage advocacy was insufficient to overcome political opposition (Halley, 2010). Despite the movement's considerable efforts expended on marital status; however, it is not clear whether the majority of LGBTQ people will be interested in accessing this institution. In the early 2000s, research (Hull, 2003) found that LGBTQ participants largely approved of and favored same-sex marriage and commitment ceremonies. More recent data (Hull, 2019) indicates that LGBTQ people simultaneously support the legalization of same-sex marriage but distrust the institution, harboring ambivalence about the potential to marry themselves.

Even with these divisions, the LGBTQ movement's fight for legal recognition of same-sex marriages is inextricably connected to polyamorous family recognition and the future of polyamorous marriage. Both polyamorous and LGBTQ parents and families have been perceived as related attacks on the traditional U.S. family. Connecting the two causes, critics have bemoaned the potential slippery slope of the Supreme Court's same-sex

marriage opinions in Obergefell v. Hodges (2015) and United States v. Windsor (2012), lambasting the judgement's potential to open the flood gates to plural marriage and polyamorous relationships (Sheff, 2011). Chief Justice Roberts dissented from the majority opinion, finding that the decision's reasoning would inappropriately extend beyond dyadic same-sex coupling to the creation of plural marriage, rhetorically asking, "Why would there be any less dignity in the bond between three people who, in exercising their autonomy, seek to make the profound choice to marry?" (Obergefell v. Hodges, 2015: 704). Furthermore, activists working on behalf of same-sex marriage have often cast it in direct opposition to multiple-partner marriage and have worked diligently to distinguish acceptable same-sex dyads eager to assimilate within conventional marriage standards from marginalized others who sought multiple-partner relationships (Den Otter, 2015; Sheff, 2011). Activists have since labeled their success in gaining legal recognition for same-sex partners who marry as *marriage equality*, though others have highlighted the fact that it is a limited equality given only to some that does not apply equally to everyone who might wish to marry, including polyamorous relationships (Den Otter, 2015).

In contrast to the LGBTQ social movement's prioritization of legal marriage, polyamorous people appear to desire and advocate less for marital recognition of their relationships (Aviram, 2008; Sheff, 2011). Qualitative research with polyamorous people indicates their apathy and even disdain towards government intervention in relationships and marriage (Aviram, 2008), perhaps due in part to the availability of dyadic marriage that allows polyamorous people to gain the benefits of marital status with one of their partners (Sheff, 2011). However, there is limited evidence that the political tide may already be heading towards the recognition of multi-parent and partner families (including polyamorous ones) via plural domestic partnerships. This past year, Somerville, Massachusetts became the first U.S. municipality to recognize plural legal domestic partnerships for the purposes of zoning laws, hospital and jail visitation, and other municipally controlled benefits (Somerville, 2016). And, in the Spring of 2021, Somerville's sister city of Cambridge, Massachusetts and the neighboring Town of Arlington passed similar legislation recognizing plural domestic partnerships within the jurisdictions. Whether this is a state-isolated occurrence unlikely to be repeated or the beginning of wide-spread reform to state and municipal definitions of family is as of yet unclear.

In the meantime, polyamorous parents face pressing questions that bear a striking resemblance to those LGBTQ parented families have encountered. For example, what does the law make of children who are not related to all of their parents by blood or marriage? What is to be done with the children of a long-term cohabitating quad (four-person polyamorous relationship) in which none of the parents are legally married and only one of them is biologically related to the child? Who is recognized as a legal parent for the purposes of custody and visitation and who is overlooked or excluded from consideration? How can polyamorous parents protect their rights to their children? To brainstorm potential avenues for legal protection, we must look beyond marital rights alone, and to the other common tools employed by LGBTQ parents prior (and after) *Obergefell*.

Strategies two - five: Recognition of parentage

The rights to retain custody and visitation of children is a key element of sexual citizenship with crucial importance to LGBTQ and polyamorous parents. Child custody has long been a hotly contested battle ground for both LGBTQ and polyamorous families. As summarized *above*, state law offers judges vast discretion in undertaking family court decisions, incidentally, allowing internalized-judicial biases to infiltrate court proceedings and case outcomes for LGBTQ and polyamorous families (Cohen, 2017; NCSF, 2019). Coupled with the fact that polyamorous parents are unable to acquire legal marriage or divorces amongst all parental partners, these arrangements leave polyamorous families not only without the initial protection and rights afforded by marital status, but also the benefit of the State's recognition of relationship and parental status during the decoupling (e.g., division of assets and alimony) and custody process. The following section surveys the four legal tools that LGBTQ parents have deployed to protect their parental rights, and their potential applicability to polyamorous parents for formalizing their own familial rights; these include de facto parentage, second parent adoption, relying on the Best Interests of Children (BIOC) standard, and creating parenting agreements. These tools are not remotely equivalent to the automatic state presumption of parentage awarded to married dyadic couples, they are costly, and their effectiveness is rampantly unpredictable for parents and their children.

De facto parentage Some states have recognized non-biological, unmarried parents (including same-sex partners) through a legal status called de facto parentage (also referred to as presumed parentage, psychological parentage) (e.g., Arizona, A.R.S. 25–409, California, Cal. Rules of Court Rule 5.534, Connecticut, Conn. Gen. Stat. Ann. §46b-59, Kentucky, Ky. Rev. Stat. Ann. § 403.270). In general, a parent establishes their de facto parentage status by providing evidence that they invested energy and care in the child at a level akin to that of a parent (Parness and Timko, 2018). Courts consider a range of factors (varying across States) when determining whether an individual has functionally acted as a parent to a child, including: (1) whether the other parent(s) has consented to or supported the formation of a parent-like relationship between the de facto parent and child, (2) whether the de facto parent has exerted responsibility over the child, and (3) whether the de facto parent has exercised such responsibility and care for a sufficient duration of time (typically between six to 12 months) (Lee, 2017). De facto parentage has proven to be a crucial legal tool for LGBTQ parents, grandparents, stepparents, families of color, and other families that are not founded on marital status, biological relationship, or formal adoption (Movement Advancement Project et al., 2012).

However, de facto parentage does little to establish parental rights prior to court interventions, which can be expensive and rancorous. Complicating matters, judges have considerable discretion when undertaking de facto parentage determinations and risk exerting bias against polyamorous parents. This dependence on the whim of judicial determination makes de facto parentage inherently uncertain (Lee, 2017), and relying on this legal tool compels parents to gamble with their rights after months or years of supporting a child. The child custody litigation process is costly, both financially (costing upwards of $10,000; Movement Advancement Project et al., 2012) and emotionally, for

litigants who must prove that they had a parental relationship with their child, likely in opposition to other parent(s) and past partner(s). Further, the majority of U.S. states have not yet adopted de facto parentage. As such, de facto parentage is an insufficient legal tool to protect polyamorous parents and their children.

Second parent adoption Second parent adoption enables an additional parent to adopt their partner's child without the first parent losing any legal parental rights, and it has proven an invaluable legal tool for LGBTQ parents. Same-sex couples who were prohibited from jointly adopting their child simultaneously due to judicial bias or state law restrictions on same-sex couples were typically the primary users of second parent adoption. Now, second parent adoption has become more commonplace, and many different kinds of couples use second parent adoption when they bring their children from one marriage into another when the divorced partner agrees to relinquish their parental rights to the new step parent. Studies show that same-sex, unmarried partner families are less likely to have children if the state they live in does not allow for second parent adoptions (Baumle and Compton, 2017).

Despite the demonstrated utility of second parent adoption for some couples, this legal avenue has considerable drawbacks for polyamorous family formations. The United States has long capped the right to parentage at two, and only a handful of courts or legislatures in liberal states like New York or California (SB 274, 2013) have been willing to recognize more than two parents via second parent adoption (or, rather, "third parent adoption"). Limiting the number of legal parents to two presents serious issues for blended families, wherein a stepparent may be unable to convince the parent from the prior relationship to voluntarily terminate their own parental status (Trinh, 2015; Lee, 2017). Further, second parent adoptions cannot occur prior to a child's birth and can take many months to successfully complete, leaving the second (or third) parent's parental status in legal limbo during that time. In sum, second parent adoption is of little use for families with more than two parents, polyamorous or not, caring for children.

Best interests of children Family court judges apply the best interests of the child (BIOC) standard during child custody disputes, using the child's interests to control parental visitation and custody. The judge interprets the child's interests by examining state mandated or suggested factors including but not limited to: the child's preferences (if old enough), the parent's living environment, the parent's ability to financially and emotionally support the child, the parents' relationship prior to the separation, and the promotion of a stable living and community environment for the child. BIOC standards are flexible and open to interpretation, leaving judges vast discretion in their custody determinations.

On the surface, BIOC standards may seem objective and based on neutral criteria, but closer examination indicates that BIOC standards have produced anything but objectivity (Funderburk, 2013). Judges have implemented BIOC standards in a demonstrably discriminatory fashion against LGBTQ parents facing child custody disputes (Cohen, 2017; Chang, 2003). In recent decades, family courts have routinely concluded that awarding custody to LGBTQ parents did not meet the BIOC because their sexual or gender nonconformity caused or could cause harm to their children. Although some LGBTQ parents in more progressive or objective courts have successfully received full child

custody and visitation rights through BIOC determinations, reliance on BIOC creates opportunities for discrimination and unpredictable judgments against LGBTQ parents due to their flexible nature and considerable judicial deference (Authors, Forthcoming).

BIOC standards are also a poor legal avenue to secure the rights of polyamorous parents. Our review of the limited family court case law on polyamorous families indicates judicial bias against polyamory. Similar to the failings of de facto parentage, BIOC standards do not establish parental rights prior to child custody disputes, trial processes are emotionally and financially costly, and trials consign parental rights to unpredictable legal limbo as families cannot predict the judicial outcomes.

Parenting agreements Parenting agreements are written documents drafted to formalize an adult's intention to become a legal parent with all associated rights and responsibilities and recognize that an extant parent (through a genetic relationship or otherwise) waives their exclusive right to child custody. Unmarried same-sex couples who lived in states that had not (yet) recognized same-sex marriage or second parent adoptions initially relied on this legal tool to protect their families (National Center for Lesbian Rights, 2019). Though not automatically legally controlling, some courts have recognized and enforced parenting agreements (National Center for Lesbian Rights, 2019). When compared to other legal tools, parenting agreements are relatively affordable, typically costing below $500.

Parenting agreements have important limitations, however, because they do not automatically establish parental status. Family courts are not legally bound to follow them. Rather, BIOC standards still apply, regardless of the presence of a formal parenting agreement. When all parties wish to retain the agreement, the court is unlikely to disturb it, but if any of the parents want to change their arrangement, then the court may not give substantial deference to the previous agreement. Although parenting agreements are better than nothing for polyamorous parents who lack formal parental status, parentage agreements are unreliably enforceable.

Inequitable access to legal family formation

Though each of the legal tools offer some potential applicability to polyamorous families, they share common detriments: they cost money, time, emotional labor, and do not offer guaranteed success. In order to use these legal tools, parents may spend years consulting and contracting with family law attorneys only to be later embroiled in costly litigation. Access to the protections that these legal tools afford families is thus restricted to those with the money, time, and energy to engage legal institutions. Beyond the emotional and financial costs associated with utilizing these legal tools, none of them provide unmarried polyamorous parents (as well as all other family forms with more than two parents) equal access to those parental rights automatically awarded to married, different-sex couples. This analysis demonstrates the considerable deficiencies currently at work in family law, deprivileging any family formation outside of those formed by two persons through legal marriage.

Similarities across difference and opportunities for joint resistance

These legal tools to secure sexual citizenship have an underlying, unspoken normative assumption: that parents, including non-traditional ones, should work *with the law* (and its tools) to protect their parental rights (Ewick and Silbey, 1998). This strategy has had mixed results and warrants critique. Clearly, family law has presented considerable barriers to diverse families' efforts towards formal recognition and protection, regardless of whether such families elected (or were forced to) to work with the legal institution or not. For example, despite federal recognition of same-sex marriage and anti-discrimination legislation in some states, LGBTQ parents continually encounter bias and discrimination in family law courts, who retain considerable discretion and individual choice over such matters. Further, one of the considerable drawbacks to formal legal sexual citizenship via the accumulation of sexual rights is that it is secured in the legal and political arenas—locations notoriously hostile and inaccessible to those experiencing poverty, Black, Indigenous, and other people of color (BIPOC), and anyone disenfranchised from institutional power (Dreher, 2017; Hartal and Sasson-Levy, 2017; Johnson, 2017).

Legal recognition of same-sex marriage has demonstrated that simply expanding laws to include yet another family form fails to address established inequitable legal divisions that family law institutions create and perpetuate (Den Otter, 2015). As the proportion of unmarried adults in the population, both with and without children, has grown dramatically in recent decades (Pew Research Center, 2018), inequalities between married and unmarried families become more egregious. Further, marital rates vary considerably by race, with African Americans much less likely to ever legally marry than their white counterparts across all other demographics (Raley et al., 2016). Legal distinctions between married and unmarried, same and other sex, and dyadic or plural partner families are important because they withhold or award rights based on state-policed statuses (Mayeri, 2015; Brake, 2012).

The growing proportion of unmarried adults and the racial differences in marriage rates nevertheless do not appear to impinge on U.S. *marital supremacy*—the legal privileging of marriage through the allocation of rights or judicial favoritism—which continues to benefit married relationships while disadvantaging and discriminating against those who either cannot or will not engage in the institution (Mayeri, 2015). Rather than expanding to include polyamorous families, we instead urge reforming and reducing the marital institution and decreasing its hegemonic, legal, and symbolic control in order to address current inequalities (Brake, 2012). It is long and pervasive inequitable history calls into question marriage's utility as a rights-promoting institution for disadvantaged and discriminated groups, including polyamorous families. Beyond such a specified critique, the overall strategy of accumulating additional rights via the normative institution of the law does little to expand the more intangible aspects of sexual citizenship, including feelings of community, belonging, and cultural acceptance.

Expanding sexual citizenship through sexual rights so as to include polyamorous parents and relationships may come with real practical and symbolic costs. For example, bringing polyamorous relationships (and other non-traditional families) into the fold of legal marriage or parental status may produce constraints on polyamorous people's and parents' behavior, desires, and identities. The law's familial definitions support marital

supremacy (Mayeri, 2015), dyadic sexual and romantic monogamy (Delphy, 1996; Dreher, 2017), and state control over relationships. This is at odds with the current diversity of polyamorous relationships and their documented desires against state intervention in their relationships. Further, incorporating non-normative relationships of polyamorous parents into a normative rights regime like family law may symbolically represent the normalization of polyamorous relationships and parentage (Phelan, 2001), which works against the radical values of this relationship structure. Similar criticisms have been made for the normalization of same-sex sexualities and partnerships through the institution of marriage, whereby LGB sexuality and diversity is neutralized, tamed, and brought within the ambit of heteronormativity and neoliberal family values (Stychin, 2001; Richardson, 2000; Cossman, 2002). We must acknowledge the ways in which enhancing the sexual citizenship of polyamorous parents may perpetuate harmful social and legal divisions between "good" citizen-parents (i.e., married, white, monogamous) and bad (i.e., unmarried, of color, non-monogamous), or in more consequential terms, between those with rights and those without.

Historically, as LGBTQ rights expanded in the United States, equality did not in truth expand to include LGBTQ persons and their relationships. Rather, LGBTQ people and relationship were expected to assimilate via the adoption of heteronormative values, thereby creating a new form of homonormativity (Duggan, 2002). A similar process may occur to polyamory; if recognized socially and/or legally, polyamorous persons and relationships could be expected to emulate heteronormative values, including state-sanctioned commitment (via marriage or domestic partnerships), gendered division of labor, and other norms that conflict with contemporary polyamorous communities' values. Further, the probable recognition of only a select type(s) of legally palatable polyamory may *other* relationship practices outside of it. This could mean excluding and discriminating against more sexually based consensual non-monogamous types that do not require commitment or love amongst all partners, such as swingers and open relationships. One of the considerable drawbacks to formal legal sexual citizenship via the accumulation of sexual rights is that it is secured in the legal and political arenas—locations notoriously hostile and inaccessible to those experiencing poverty, Black, Indigenous, and other people of color (BIPOC), and anyone disenfranchised from institutional power (Dreher, 2017; Hartal and Sasson-Levy, 2017; Johnson, 2017).

In sum, the socio-legal project of expanding family law to include more and more types of relationships fails to address issues of inequality built into state-recognized and privileged families, uncritically espouses a strategy of sexual citizenship through sexual rights alone, and contradicts the data on polyamorous people's desires. Even so, family rights hold considerable value, particularly for those parents operating without social and legal parental status. People routinely report personal stories of harm to polyamorous friendly organizations like the National Coalition for Sexual Freedom (2019), chronicling people losing their jobs, their children, and their housing for being outed (or outing themselves) as polyamorous. There remains an irreconcilable tension between the short term gains from securing certain sexual rights, such as the right to be free from employment discrimination on the basis of your engagement in polyamory, and the longer-term costs of assimilation into the norms inherent to those rights.

Conclusion

This article has examined the discriminatory legal treatment of families with polyamorous parents in the United States and contrasted these families' socio-legal experiences with those of LGBTQ parents. Further, it presented a concise survey of five of the more common legal strategies that LGBTQ parents have employed to protect their partnerships and children. This paper concluded that all tools evaluated failed to adequately protect polyamorous parents and their children, as well as cost considerable time and money. The article then proffered a more general critique of the overall strategy to garner sexual citizenship through the accretion of sexual rights for polyamorous-parented families, determining that sexual citizenship as a myopic rights-enhancing strategy is inherently problematic because the constraints imposed by inclusion as a citizen, legally or socially, are driven by inequitable, racist, heteronormative, and classist structures. As this article has made abundantly clear, family law is not a bastion of equality. Legal divisions between married and unmarried, dyadic and plural, and same and different-sex relationships continue to create and exacerbate inequalities in who receives rights and who does not, or who is considered a legal parent and who is found to be a mere stranger to their own children. As such, including yet another family into the "haves" does little to question the perpetuity of the category of have-nots.

This article concludes that sexual rights garnering efforts like the five legal tools detailed above merely reaffirm inequitable divisions between parents and non-parents, good and bad citizens. To recognize and protect the true diversity of families living and loving in the United States, the legal and social definition of parent should be expanded beyond genetic, marital, or even formal adoptive relationships to include not only polyamorous and LGBTQ parented families but also *all* diverse family structures. The law's continued discriminatory treatment of non-traditional families—denying them equal rights to parent as well as access to other protective benefits reserved for traditional families—is an urgent social justice issue; one stretching far beyond polyamorous families alone, but to all families who cannot or wish not to be "good," white, wealthy, heterosexual, dyadically, and romantically partnered citizens. Reforming marriage, parentage, and other sexual rights inherent to family law to include polyamorous families is only one small part of realizing sexual citizenship for all families, a larger project that requires a much harder fought battle for an everyday sense of belonging. That fight is ongoing today as polyamorous people across the country and families seek safety, recognition, and protection from harm within their communities, homes, workplaces, schools, healthcare settings, and of course, the courts.

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